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In The
Supreme Court of the United States

October Term, 1961
No. 680

THE CONTRACTORS ASSOCIATION OF PHILADELPHIA AND EASTERN PENNSYLVANIA, A PENNSYLVANIA CORPORATION OF THE FIRST CLASS; THE GENERAL BUILDING CONTRACTORS ASSOCIATION; AND THE PENNSYLVANIA EXCAVATORS ASSOCIATION,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1961

No.

The Contractors Association of Philadelphia and Eastern Pennsylvania, a Pennsylvania Corporation of the First Class; The General Building Contractors Association; and The Pennsylvania Excavators Association,

Petitioners

v.

National Labor Relations Board,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Contractors Association of Philadelphia and Eastern Pennsylvania, a Pennsylvania corporation of the First Class; The General Building Contractors' Association; and The Pennsylvania Excavators Association, respectfully pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 1, 1961.

OPINIONS BELOW

The decision and ruling dated August 8th, 1961 of General Counsel of the National Labor Relations Board dismissing Petitioners' appeal from the refusal of the Regional Director to issue a Complaint charging violations of the National Labor Management Relations Act against Local Unions 542, 542-A and 542-B of the International Union of Operating Engineers, AFL-CIO, (see Appendix A, page 1a). The opinion of the Court of Appeals of the United States for the Third Circuit, and the Order of such Court dismissing Petitioners' Petition for Review dated October 31, 1961 (Appendix B, pp. 3a-5a).

JURISDICTION

A decree of the United States Court of Appeals for the Third Circuit enforcing the decision and order of the National Labor Relations Board in the instant case was entered on October 31, 1961. The jurisdiction of this Court to review that decree by writ of certiorari is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the Determination of General Counsel of the National Labor Relations Board not to Direct the Issuance of a Complaint in the Name of the Board (Upon Charges Filed by Three Groups of Employers), charging unfair labor practices against certain labor unions, an order of the Board appealable to your Honorable Court pursuant to Section 10(f) of the National Labor Relations Act as amended, 61 Stat. 148 (29 USCA, §160(f))?

2. If the Answer to Question No. 1 is in the negative, nevertheless, do not Petitioners have a constitutional right to have judicially reviewed the action of the National Labor Relations Board in dismissing their charges that fundamental common law property rights enjoyed by them as Employers, have been damaged by unfair labor practices committed against them by certain labor unions?

STATUTE INVOLVED

National Labor Relations Act*

Sec. 1.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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* Act of July 5, 1935, Sections 1, 8 and 10, 29 U.S.C.A. 151; 158 and 160(f) (h).

Statute Involved

Sec. 8

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9.

Sec. 10(f)

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order

of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(h) *Jurisdiction of courts unaffected by limitations prescribed in sections 101-110 and 113-115 of this title.*

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101-110 and 113-115 of this title."

That portion of the Fifth Amendment to the Constitution of the United States which provides as follows:

"No person shall . . . be deprived of life, liberty or property without due process of law".

STATEMENT

Your Petitioners, The Contractors Association of Philadelphia and Eastern Pennsylvania, The General Building Contractors Association and the Pennsylvania Excavators Association, are the historical and presently recognized Collective Bargaining Representative of the Building Construction, Excavation and Heavy and Highway Construction Industry in the five counties of Southeastern Pennsylvania, viz.: Philadelphia, Bucks, Montgomery, Delaware and Chester, representing in all some one hundred forty-four (144) persons engaged in the building and heavy and highway construction business in the above mentioned area.

On or about May 14, 1959 your Petitioners, as the Exclusive Collective Bargaining Representative of the Heavy, Highway, Excavation and Building Construction Industry in the southeastern Pennsylvania area aforesaid, entered into a Collective Bargaining Agreement with Local Unions 542, 542 A and 542-B of the International Union of Operating Engineers, AFL-CIO, hereinafter called "Local Unions". The members of such "Local Unions" operate construction equipment used in the building and construction business. On April 30th, 1961 the Collective Bargaining Agreement between your Petitioners and "Local Unions" expired.

Negotiations for the renewal of such Collective Bargaining Agreement had been begun some time prior to April 30, 1961, but as of the date of May 2, 1961 such

negotiations were stalemated because of the unreasonable demands of the aforesaid "Local Unions".

The Collective Bargaining Negotiating Committee of your Petitioners was and is composed of the certain John Buckley, Francis A. Canuso, Jr., Harry R. Halloran, James Glasgow, William E. Gelbach and William E. LaForge.

John Buckley, Francis A. Canuso, Jr., Harry R. Halloran and James Glasgow are Officers, Directors, proprietors and owners of Buckley & Company, F. A. Canuso and Sons, The Conduit and Foundation Corporation and Glasgow, Inc., respectively, which corporations are members of The Contractors Association of Philadelphia and Eastern Pennsylvania. Mr. Gelbach, is General Manager of J. D. Morrissey, Inc., a member of The Contractors Association of Philadelphia and Eastern Pennsylvania. Mr. LaForge is employed by the General Building Contractors Association on a full time basis as its Assistant Director of Labor Relations.

On May 3, 1961 without prior warning or notice representatives of the "Local Unions" struck all of the job projects of Buckley & Company, F. A. Canuso and Sons, The Conduit and Foundation Corporation, Glasgow, Inc., and J. D. Morrissey, Inc., in the five counties of southeastern Pennsylvania above mentioned. At the same time job site operations of several other members of The Contractors Association of Philadelphia and Eastern Pennsylvania were struck, but such fact is of secondary consequence because such strikes occurred solely because the persons so struck (except in two instances) were subcontractors, whose operations were directly affected by the strike directed against the aforesaid Buckley & Company,

Statement

F. A. Canuso and Sons, The Conduit and Foundation Corporation, Glasgow, Inc., and J. D. Morrissey, Inc.

Not any strikes were directed against any members of the General Building Contractors Association.

On May 22, 1961 your Petitioners filed an unfair Labor Charge with the National Labor Relations Board (Fourth Region) averring that the action of the "Local Unions" in striking only the job projects of Buckley & Company, F. A. Canuso and Sons, The Conduit and Foundation Corporation and Glasgow, Inc., was maliciously directed against such four corporations because of the fact that such corporations were owned and operated by Messrs. Buckley, Canuso, Halloran and Glasgow, who, together with Mr. Gelbach, General Manager of the Morrissey Company, constituted the entire membership of the Heavy, Highway, Excavation, Building and Construction Industry Labor Collective Bargaining Negotiating Committee.

The charges so filed averred that the action of the "Local Unions" in singling out five members of the Employers Negotiating Committee for punitive action was done for the purpose of coercing and intimidating Employers Negotiating Committee, and in consequence such action is and was an unfair labor practice contrary to public policy and violative of the very principles for which the Labor Management Relations Act stands. It was contended by Petitioners that if such actions were not held to be unfair labor practices, so as to be restrainable by a "cease and desist order," and if the continuance of such labor tactics was condoned rather than condemned, the purposes for which the Labor Management Relations Act was enacted will be frustrated and defeated, because it

would be in the future impossible to secure employer representation in collective bargaining negotiations.

On June 30th, 1961 Bennet F. Schauffler, Regional Director of the Fourth Region, without assigning any reason therefor, by letter dated June 30, 1961 informed your Petitioners that their charge of an unfair labor practice against the "Local Unions" was dismissed. Within the time required by law your Petitioners appealed to General Counsel for the National Labor Relations Board, which was duly acknowledged by letter dated July 14, 1961.

By letter dated August 8th, 1961 your Petitioners were advised by General Counsel of the National Labor Relations Board that their Appeal had been considered and was dismissed because there was not sufficient evidence of violations and for such reason the action of the Regional Director was sustained. Again, not any reason was assigned for the action of the National Labor Relations Board in dismissing the Charge of your Petitioners.

Shortly thereafter, on August 22nd, 1961, your Petitioners filed a Petition for Review with the United States Court of Appeals for the Third Circuit, asking such Court to judicially review the action of the National Labor Relations Board in dismissing your Petitioners' charges that fundamental common law property rights enjoyed by them as Employers have been damaged by unfair labor practices committed against them by the "Local Unions" because the action of the National Labor Relations Board in dismissing Petitioners' charge was a justiciable or juridical act and not an administrative one and therefore, whether such action of dismissal was a proper one was constitutionally subject to judicial review.

BASIS FOR FEDERAL JURISDICTION

1. Section 10 f of the National Labor Management Relations Act of 1947, as amended 29 U.S.C.A. 160.

2. Section 10 h of the National Labor Management Relations Act of 1947, as amended 29 U.S.C.A. 160.

3. The Fifth Amendment of the Constitution of the United States, which provides as follows:

> "No person shall . . . be deprived of life, liberty or property without due process of law".

REASONS FOR GRANTING THE WRIT

The act of General Counsel of the National Labor Relations Board was a *final determination* that the National Labor Relations Board would not take any action to protect the fundamental common law rights of Petitioners, as employers, which had been unlawfully invaded by the "Local Unions". The act of the General Counsel in determining that such fundamental common law right of Petitioners, either did not exist, or had not been invaded, was *judicial* in character, and not *administrative*, therefore your Petitioners have a constitutional right to ask that such act be reviewed judicially both by the Circuit Court of Appeals and by your Honorable Court.

The silence of Congress concerning judicial review is not necessarily a denial of that right, which is inherent in the general jurisdictional powers which Congress has conferred upon the Federal Courts. While Congress may deny the right of judicial review of administrative acts in appropriate cases, such right of review cannot be denied, where (1) The Constitution requires judicial review of administrative acts, or (2) where the so-called administrative act was not administrative, but was justiciable or juridical in character. *American School v. McAnnulty*, 187 U.S. 94; *Gegior v. Uhl*, 239 U.S. 3; *Stark v. Wickard*, 321 U.S. 288.

Generally; it has been held that where a basic fundamental common law property right, existing at common law, equity or in admiralty, as a matter of private right,

such right cannot be destroyed by administrative formalities because such destruction would, as differently expressed, be a denial of due process, a destruction of vested constitutional rights, or a violation of the fundamental law of the land.

Where property rights are involved the diminishing of such rights or their destruction is a justiciable juridical question and is not the mere exercise of an administrative function. Accordingly, judicial review in such cases exists as a matter of inherent right and cannot be lost by mere congressional silence.

Here in this case we have a situation similar to that referred to in *Estep v. United States*, 327 U.S. 114 (1945), where it was said at page 119 as follows:

> "Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. American School v. McAnnulty, 187 U.S. 94, 47 L. ed. 90, 23 S. Ct. 33; Gegior v. Uhl, 239 U.S. 3, 60, 1 Ed. 114, 36 S. Ct. 2; Stark v. Wickard, 321 U.S. 288, 88 L. ed. 733, 64 S. Ct. 559. Judicial review may indeed be required by the Constitution. Ng Fung Ho v. White, 259 U.S. 276, 66 L. ed. 938, 42 S. Ct. 492. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. Switchman's Union

of N.A. v. National Mediation Bd., 320 U.S. 297, 301, 88 L. ed. 61, 64, 64 S. Ct. 95. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses."

The rule is well stated in 42 *American Jurisprudence*, "Public Administrative Law", where it is said at page 554 as follows:

> "The exact boundary lines of the minimum constitutionally required judicial control of administrative action are subject to controversy and may vary according to the constitutional requirements prevailing in a particular jurisdiction. So far as the power of Congress is concerned, a distinction had been made between any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty, as a matter of private right, and those matters which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments; and it has been said that Congress has no power to withdraw completely from judicial cognizance cases involving matters of the former type, but may prescribe the mode of determining matters of the latter type, these matters not necessarily requiring judicial determination. Similarly, state courts have held that there is a class of important interests, such as the existence or nonexistence of a nuisance, the use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all of which fall on some occasions, in important respects, within the sphere of judicial

function, particularly where a common law right is involved, and that, for this reason, the question whether such a common law right exists is a judicial question and cannot be settled conclusively except in regular course of law before the established courts of law or equity."

At common law in Pennsylvania it was actionable to induce third parties to leave the employment of another, or in concert with others, agree and combine not to enter the employ of such third party.

In *Max Zander Co. v. Amalgamated Clothing Workers*, 33 Fed. (2) 203 (1929), Kirkpatrick, D.J. said inter alia, at page 206, as

"At common law, to induce third persons to leave an employment is actionable if done maliciously and without justifiable cause, although such persons are free to leave at their own will. Hitchman Coal Co. v. Mitchell, 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L.R.A. 1918C, 497, Ann. Cas. 1918B, 461; Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283."

And again at page 207:

"When we turn to the common law of Pennsylvania, we find what appears to be a total denial of self-interest as a justification for procuring the employees of another to strike. In Purvis v. United Brotherhood, 214 Pa. 348, 63 A. 585, 589, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 1275, the court said: 'True, the defendants contend and testify that their purpose was to benefit their own members. This,

doubtless, in a sense, is true, but the benefits sought were the remote purpose, which was to be secured through the more immediate purpose of coercing the plaintiffs into complying with their demands, or otherwise injuring them in their business, and the court cannot, in this proceeding, look beyond the immediate injury to the remote results. Such is the doctrine laid down in Eddy on Combinations and quoted with approval in the case of Erdman v. Mitchell, supra [207 Pa. 79, 56 A. 327, 63 L.R.A. 534, 99 Am. St. Rep. 783], as follows: 'The benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the nonunion workmen' (in this case the nonunion millowners) 'that the law does not look beyond the immediate loss and damage to the innocent parties to the remote benefits that might result to the union'. The conclusion is that at common law, both in Pennsylvania and under the federal decisions, irrespective of any question of procurement of breach of contract, the efforts of the defendants even by peaceful persuasion to bring about strikes in the plants of the plaintiffs are without justification "and therefore actionable".

It should be noted that Judge Kirkpatrick held that Pennsylvania was one of the jurisdictions which denied "self interest" as a justification for procuring the employees of another to strike.

It is likely true that the decisions of the Pennsylvania Supreme Court in the cases of *Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers*, 305 Pa. 206 (1931), and *Kirmse v. Adler*, 311 Pa. 78 (1933), indicated that the Pennsylvania common law was moving

away from its rule that self interest was not a justification for inducing a strike towards the rule of the *Restatement of the Law of Torts* (see pages 97 and 98 and 101 to 102, Vol. 4, set forth in Appendix C hereof) that concerted action was justifiable if it was exerted in good faith, by proper means for a proper purpose or object.

In the *Kraemer Hosiery Case*, supra, it was said at pages 215 and 216 as follows:

> "On the other hand, appellant was free to act, by peaceful persuasion, at a proper time and in a proper way, by the spoken, written or printed word, to induce employees who had signed those agreements to withdraw from plaintiff's employ and affiliate with the union, and, as already stated, their contracts recognized that privilege. Had this been the course pursued an injunction could not properly have been granted. Appellant also had the right at a proper time and in a proper way, to point out to plaintiff's employees that their contracts, whether legal or illegal, were unwise, and hence the employees should exercise their privilege to 'withdraw from the employment of said company.' This much is secured to the citizen by the constitutional provision that: 'The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty'. This declaration is no higher, however, than the one which sustains the inviolability of legal contracts, and hence any attempt, by speaking, writing or printing, wrongfully to induce an employee to break his contract with his employer, thereby causing irreparable injury to the latter, makes

the one so acting 'responsible for the abuse of that liberty'. It is not always easy to determine when speaking, writing and printing becomes an actionable abuse, especially in labor troubles, but, as we have already pointed out, this difficu does not exist in the present case. We accordingly approve the granting of an injunction against appellant, but modify the final decree as regards him, so that it shall provide as follows: * * * "

Similarly, in *Kirmse v. Adler*, 311 Pa. 78 (1933), it was said at pages 85 and 86 as follows:

"Appellants are entitled to present their cause to the public by circulars calculated to induce others to stand with them, provided the arguments employed are peaceful and no coercion is attempted. They can inform the public of the existence of their difficulties, the reasons for them, and ask the public for support and request them generally to assist by not patronizing plaintiffs' business. Appellants do not deny their acts were calculated to compel the theatre men to employ men at the union scale by injuring the patronage. The primary aim was the protection of the employment of their members at the union rate of wage, while the means employed involved as a secondary purpose the injury of appellee's patronage. We have held such acts lawful. In Jefferson & I. Coal Co. v. Marks, supra, where the injunction was sustained because of coercion and intimidation, we said, however, at page 176: 'Appellants claim that primarily their aim and purpose was to maintain a proper standard of wages by persuading men to stop working for less wages, though the indirect result of this effort was to shut

down the Adrian mine, while appellee claims the indirect purpose was the primary one.

"'A peaceful effort, individually, collectively or concertedly, to bring about a *cessation of labor* in order to enforce a demand for betterment of wage or living conditions, even though the indirect purpose if accomplished, is not unlawful.

"'While the right to form combinations, and through a strike to exert means to prevent men from working, may be lawful, it remains so only as long as the means employed are lawful.' If the words 'cessation of labor' in this quotation are removed and 'cessation of patronage' are substituted, it is apparent that the question in this case narrows down to whether the means here employed are lawful. Unless the means employed are unlawful, the motive for the acts is immaterial."

Accordingly, it can be confidently asserted that immediately prior to the enactment of the Labor Relations Acts (Wagner Act of 1935; Taft-Hartley Labor Management Relations Act of 1947, and the 1959 Amendments), it was actionable in Pennsylvania for a third person, in the absence of self interest, to take steps which would induce the employees of another to strike. To establish such "self interest" it was necessary for such third party to show that the action was taken in good faith, by proper means, and for a proper purpose or object.

Accordingly, prior to the enactment of the National Labor Relations Acts the employer had a property right enforceable against interference by third parties, in the

continued employment of his workers, unless such interference was conducted in good faith, for a proper purpose or object and by proper means. Parenthetically, embraced within the Labor Relations Acts' concept of unfair labor practices are objects and conduct which the authors and commentators of the Restatement of the Law of Torts consider improper objects and improper means.

Prior to the enactment of the National Labor Relations Laws above referred to, the determination of whether concerted action by third parties against an employer and his employees was being asserted in good faith, for a proper purpose or object and by proper means was a justiciable juridical question the determination of which was constitutionally vested in the courts.

The lodging of such power of determination in the Courts, accords with our system of jurisprudence, because, the question whether the employer's property rights in the continued employment of his employees has been improperly interfered with by third persons was and is a justiciable juridical question.

Even more to the point whether good faith was exercised, whether the purpose or object was proper and whether the means employed in such concerted actions were properly exercised was and is obviously a *justiciable juridical* question and cannot by even the greatest exercise of the imagination be distorted to be an *administrative act*.

It is conceded that the National Labor Relations Acts constituted an absolute and complete preemption of the labor management relations field by Congress and that the National Labor Relations Board has jurisdiction in labor

matters, except in those instances where police power is retained to protect against damage to persons and or property in consequence of violence along the picket lines or elsewhere. *Garner v. Teamsters Local Unions*, 373 Pa. 93; affirmed 346 U.S. 485 (1954).

Prior to the enactment of the National Labor Acts whether the selective striking of the "Local Unions" directed almost exclusively against the members of the Employers Collective Bargaining Negotiating Committee was an exercising of concerted action against employers in good faith by proper means was a justiciable controversy, which would have been decided by the courts of Pennsylvania.

The question which would have been considered and decided by the Pennsylvania courts was and is the same question which General Counsel for the National Labor Relations Board purported to consider and decide, viz., insofar as the Pennsylvania courts are concerned—was the selective strike conducted in good faith or was it an unfair labor practice. The question considered by the General Counsel of the National Labor Relations Board must necessarily be the same question which would have been decided by the Pennsylvania courts, namely, was the concerted action against the Employer's property rights exercised in good faith, by proper means, or was it exercised in such bad faith and by such improper means, as to constitute "unfair labor practices".

The decision of the Pennsylvania courts and of General Counsel for the National Labor Relations Board obviously must be applied to the same objective facts, and this conclusion cannot be escaped by describing one process as a judicial one, and the other process as the mere exercise of an administrative function.

It is submitted that the denial to the Employer of a right to judicial review in a case of this character is violative of the constitutional principle of law stated in *Estep v. United States*, 327 U.S. 114 and of the cases referred to in 42 Am. Jurisprudence 554, quoted above.

The question here presented has been considered by the text writers who have expressed views in accordance with those set forth in this Brief. See *Cuthbert W. Pound*, "*The Judicial Power*", 35 Hrv. L. Rev. 787, 792; *Samuel C. Wiel*, "*Administrative Finality*", 38 Hrv. L. Rev. 447; *Cuthbert W. Pound*, "*Constitutional Aspects of American Administrative Law*", 9 Am. Bar Assn. J. 409.

Consideration has been given to the fact that Section 10(f), 29 U.S.C.A. 160(f) of the Labor Management Relations Act of 1947 does provide for judicial review from a Final Order of the National Labor Relations Board. It is submitted that the congressional care for property rights indicates that Congress did not intend to establish a situation where an employer would be deprived of substantial property rights merely because within the framework of the Act itself, it was not spelled out in A, B, C language, that the directive of General Counsel refusing to issue a Complaint of unfair labor practices upon the Charge of an Employer was an appealable action. It is obvious that the action of General Counsel of the National Labor Relations Board in this case was the type of administrative finality criticized by the authorities cited above.

If it shall be held that because the Labor Management Relations Act of 1947 does not specifically provide for an appeal from the refusal of General Counsel of the National Labor Relations Board to issue an Unfair Labor Complaint against a Labor Union upon an Employer's Charge, the

conclusion is inevitable that the Labor Management Relations Act has unconstitutionally deprived an employer of the right of judicial review upon the question of whether he has been unconstitutionally deprived of property rights, and has been denied due process because of the failure of the Labor Management Relations Act of 1947 to provide for judicial review of a question which is essentially justiciable.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue its writ of certiorari to review the decision below.

Respectfully submitted,

MAXEY McHUGH,
Counsel for Petitioners,
Office and P.O. Address,
1709 Girard Trust Building,
Philadelphia 2, Pa.

STRONG AND SULLIVAN,
Of Counsel.

Appendix "A" — Letter of General Counsel
Dated August 8, 1961

APPENDIX A

NATIONAL LABOR RELATIONS BOARD
(Seal) Office of the General Counsel
Washington 25, D.C.

August 8, 1961

Re: Local Unions 542, 542-A and 542-B Operating Engineers, AFL-CIO (The Contractors Assn. of Phila. and Eastern Penna.) Case No. 4-CB-713

Mr. Maunus McHugh
Attorney at Law
Strong, Sullivan, Saylor & Ferguson
1700 Girard Trust Building
Philadelphia 2, Pennsylvania

Dear Mr. McHugh:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

This office concludes that there is insufficient evidence of violations to warrant further proceedings. Accordingly, the ruling of the Regional Director is sustained.

Very truly yours,
Stuart Rothman
General Counsel
By Irving M. Herman
Irving M. Herman
Director, Office of Appeals

Appendix "A"—Letter of General Counsel Dated August 8, 1961

cc: Director, 4th Region

The Contractors Association of Philadelphia and Eastern Pennsylvania, 1950 Suburban Station Building, Philadelphia 3, Pennsylvania

Local Unions 542, 542 A and 542 B of Intl. Union of Operating Engineers, AFL-CIO, 121 N. Broad Street, Philadelphia 7, Pa.

Mr. Abraham Freedman, Attorney at Law, 1415 Walnut Street, Philadelphia, Pennsylvania

CERTIFIED MAIL

Case Caption

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 13,725

The Contractors Association of Philadelphia and Eastern Pennsylvania, a Pennsylvania Corporation of the First Class; The General Building Contractors Association; and The Pennsylvania Excavators Association,

Petitioners

v.

National Labor Relations Board,

Respondent

Motion to Dismiss Petition for Review

Argued October 2, 1961

Before Goodrich, Staley and Smith, *Circuit Judges*

Appendix "B"—Opinion Dated October 31, 1961

OPINION OF THE COURT

(Filed October 31, 1961)

Per Curiam

The petitioners complain because the general counsel for the National Labor Relations Board has refused to institute proceedings for unfair labor practices against certain local unions. The allegation is that petitioners are entitled, under the Constitution of the United States, to judicial review of the general counsel's action since, say petitioners, that action deprives them of some property right which they hold under the common law of Pennsylvania. There is, obviously, no final order of the Board for us to review. And except in a limited number of circumstances our jurisdiction is limited to final orders. National Labor Relations Act 10 (f), 29 U.S.C.A. 160 (f). The very point raised by appellant, that is, the authority of a Court of Appeals to review a refusal by general counsel to act in a particular matter was before this Court in Insurance Workers v. NLRB, No. 13,055, and the petition for review was dismissed on January 19, 1960. Certiorari was denied by the Supreme Court, 363 U.S. 806 (1961). A similar situation was presented to this Court in Janek v. NLRB, No. 13,738, and petition for review was likewise dismissed for want of jurisdiction on September 8, 1961.

The petition in this case will be dismissed for want of jurisdiction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix "B"—Opinion Dated October 31, 1961

ORDER

Present:

Goodrich, Staley and Smith, *Circuit Judges*

It is Ordered that the motion by respondent to dismiss the petition for review in the above case be, and it is hereby granted; and that the petition for review be, and it is hereby dismissed for want of jurisdiction.

Attest:

Ida O. Creskoff
Clerk

October 31, 1961

APPENDIX C

RESTATEMENT OF THE LAW OF TORTS

Paragraph 775 of the *Restatement of the Law of Torts* entitled "*Liability for Concerted Action by Workers*" "General Principle" provides as follows:

"Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.

"Comment:

"a. This Section states the general privilege of workers to engage in concerted action and the general rule of liability for harm caused in excess of this privilege. Combinations of workmen for mutual aid and protection are no longer regarded as necessarily criminal or civil conspiracies".

Vol. 4 (pp. 97, 98)

. . . . . .

§777 of the *Restatement of the Law, Torts* (see pages 101, to 104, Vol. 4), states as follows:

"§777. Definition of 'Object' of Concerted Action.

"In this Chapter, an 'object' of concerted action by workers against an employer is an act required in

good faith by them of the employer as the condition of their voluntarily ceasing their concerted action against him.

"Comment:

"a. *Aim of this definition.* Concerted action by workers, like any other human action, is directed toward the attainment of more or less specific aims and may be actuated by a variety of desires. The immediate aim of specific action may be but a means of accomplishing a broader purpose. Some effects of the workers' conduct may be specifically desired by them as ends in themselves; others as means to an end; and still others may be regretted though regarded as inevitable. Analyses of the purposes, objects or motives of concerted action of workers are therefore apt to be vague and confusing. The same conduct is frequently viewed by different persons as directed toward different aims. Adjectives such as 'direct' or 'indirect', 'primary' or 'secondary', 'immediate' or 'ultimate' are commonly used to indicate that aspect of the aims or consequences of concerted action that the speaker wishes to emphasize. And judgment as to the legal propriety of the conduct frequently affects the description of its aims. The definition in this Section is calculated to avoid this confusion, to limit the concept of an object of concerted action to a colorless objective fact without inquiry into its consequences and to eliminate from the process of ascertaining that object any inquiry into the propriety of the conduct. After the object of concerted action is ascertained its propriety is determined by the rules

stated in §§ 784-796. Even if the object is proper, however, there are limitations on the means which may be used to attain it. These are stated in §§ 797-808.

"b. *Act required of employer.* When concerted action is undertaken against an employer by workers in a labor dispute, he is generally given an alternative to the continuance of the action. If the employer will do so and so, for example increase wages or cease using non-union goods, the action will be voluntarily terminated. If no such alternative is given to the employer, the concerted action has no object with reference to him. In the Restatement of this Subject, the word object is not used in connection with such cases.

"c. *Consequences of the object.* The consequences to the workers, or to the employer or to the public, of the attainment of the object of their concerted action are immaterial in determining what that object is. Whether that object is an end in itself or only a means to another end is likewise immaterial. A consideration of consequences is material in determining the legal propriety of the object (see §§ 784-796), but not in ascertaining what the object is.

"d. *Relation to the person against whom the concerted action is directed.* Under the rule stated in this Section the object of concerted action is determined in relation to the person against whom the action is directed and who, by performance of the required act, can secure a termination of the action (see Comment b). When a single course of action is di-

rected toward more than one person, its object may be different with reference to each of the persons.

"Illustration:

"1. A's employees go out on strike because A refuses to discontinue purchases of raw materials from B, who refuses to sign an agreement with the C union as representative of his employees. As to A, the object of the strike is his discontinuance of purchases from B during the dispute with B. As to B, the object is his signing an agreement with the C union.

"e. *Demands made by workers.* An object of concerted action by workers is generally manifested in a demand made by them. But there is no technical requirement as to formulation of demands. The parties may understand what act is required as a condition of the termination of the action without formulation of a specific demand.

"f. *Good faith.* The object of concerted action must not be confused with the motives which lead workers to desire it. The object of a strike for an increase in wages is the increasing of wages, whether the workers are moved solely by a desire for greater earnings or by ill will toward the employer or by some dogma as to the desirability of militancy at all times. The reasonableness of the demand is relevant only on the question whether it is made in good faith. To be the object of their action, the workers' demand must be made in good faith. It is not sufficient that they make the demand, if it appears that their real demand is something else and that the continuance or cessation

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 680

THE CONTRACTORS ASSOCIATION OF PHILADELPHIA ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a; R. 11a-12a)[1] is reported at 295 F. 2d 526. No proceedings were held before the Board, and the

[1] The record in the court below consisted of a petition to review with supporting exhibits and the Board's motion to dismiss with supporting exhibits. These documents are reprinted in part in the "Record" (hereafter designated "R.") filed by petitioner in this Court.

informal proceedings before the General Counsel of the Board are unreported.

JURISDICTION

The decision and order of the court of appeals were entered on October 31, 1961 (Pet. App. 4a, 5a; R. 42a). The petition for a writ of certiorari was filed on January 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly concluded that it lacked jurisdiction to review and set aside the determination of the General Counsel of the National Labor Relations Board not to issue an unfair labor practice complaint on the charges filed by petitioner.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, are as follows:

> Sec. 3. (d) * * * The General Counsel of the Board * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *.
>
> * * * *
>
> Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for

such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary

relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

STATEMENT

On May 23, 1961, petitioners filed unfair labor practice charges with the Regional Director of the Board alleging that the Unions[2] had refused to bargain in good faith, in violation of Section 8(b)(3) of the National Labor Relations Act, by engaging

[2] Local Unions 542, 542-A and 542-B, Operating Engineers, AFL-CIO.

in a strike to enforce certain demands made during collective bargaining negotiations (Pet. 7-9; R. 8a-9a). The facts showed that, upon expiration of their most recent collective bargaining contract on April 30, 1961, petitioners (three multi-employer bargaining associations) and the Unions commenced negotiations toward a new contract (Pet. 7-8). When the parties were unable to reach agreement, the Unions, on May 3, 1961, went on strike against certain employer-members of petitioners' association to exert economic pressure in furtherance of their bargaining demands (Pet. 8-9). There was no evidence that the strike was other than peaceful, or that the Unions' bargaining demands were unlawful. The Regional Director, after investigation of the charges, advised petitioners that there was "insufficient evidence of violation," and declined to issue a complaint thereon (Pet. 10; R. 25a-26a). This action was appealed to the General Counsel of the Board, who sustained the Regional Director. The General Counsel advised petitioners "that there is insufficient evidence of violations to warrant further proceedings" (Pet. App 1a; Pet. 10; R. 36a-38a).

Petitioners thereupon filed a petition in the United States Court of Appeals for the Third Circuit, requesting that court to review the General Counsel's refusal to issue a complaint (Pet. 10; R. 1a-7a). The court of appeals, in a *per curiam* opinion, dismissed the petition for lack of jurisdiction.

ARGUMENT

The decision below is correct, and no conflict of decisions exists. No issue warranting review by this Court is presented.

1. (*a*) Section 10(a) of the Act authorizes the Board to prevent any person from engaging in unfair labor practices; Section 10(b) provides for the issuance of a complaint and the holding of a hearing; Section 10(c) empowers the Board to "issue * * * an order" directing any person named in the complaint to cease and desist from the commission of unfair labor practices, or to "issue an order" dismissing the complaint; Section 10(e) confers jurisdiction on the courts of appeals in the event that the Board petitions to enforce "such order"; and Section 10(f) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the appropriate court of appeals. The decision of the General Counsel not to issue an unfair labor practice complaint is clearly not a "final order of the Board" within the meaning of Section 10(f). As this Court held in *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 406-410, the "entire structure of the Act emphasizes" that the term "final order," as used in Section 10(f), refers solely to an order of the Board rendered at the culmination of the unfair labor practice proceedings described in Section 10(b) and (c) of the Act. Accordingly, suits instituted in the courts of appeals to obtain review of the General Counsel's decision not to issue an un-

fair labor practice complaint have consistently been dismissed for lack of jurisdiction over the subject matter. *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (C.A. 1); *General Drivers, Chauffeurs, and Helpers, Local 886* v. *National Labor Relations Board*, 179 F. 2d 492, 494-495 (C.A. 10); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F. 2d 320, 321-322 (C.A. 10); *Anthony* v. *National Labor Relations Board*, 204 F. 2d 832, 833 (C.A. 6); *Insurance Workers International Union* v. *National Labor Relations Board*, No. 13,088 (C.A. 3), January 19, 1960, certiorari denied, 363 U.S. 806. See, also, *G. A. Rafel & Co.* v. *National Labor Relations Board*, No. 13,166 (C.A. 7), January 9, 1961, certiorari denied, 366 U.S. 948.[3]

(*b*) Furthermore, Section 10(b) of the Act vests the Board or its agent with broad discretionary power with respect to the issuance of unfair labor practice complaints. See *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. Section 3(d) confers this power upon the General

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[3] Petitioners' contention that it has a constitutional right to judicial review of the General Counsel's refusal to issue a complaint is without merit. The procedural provisions of the Act, including those sections which limit judicial review to a final order of the Board, "do not offend against the constitutional requirements governing the creation and action of administrative bodies." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47. "The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force." *American Federation of Labor* v. *National Labor Relations Board*, *supra*, 308 U.S. at 412.

Counsel of the Board, and provides that he shall have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *." The Act makes no provision for review of the General Counsel's threshold determination of whether an unfair labor practice proceeding should be initiated, and the Congressional intent to preclude judicial review of such a decision is not only clear from the language of the statute, but also from the characterization by Congress of the General Counsel's role as analogous to that of a district attorney in deciding whether to initiate a prosecution.[4] Accordingly, suits instituted in the district courts to review the General Counsel's refusal to issue a complaint have uniformly failed. See *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (C.A.D.C.), certiorari denied, 345 U.S. 930; *Bandlow & Sorenson* v. *Rothman*, 278 F. 2d 866 (C.A.D.C.), certiorari denied, 364 U.S. 909; *Retail Store Employees Union, Local 954* v. *Rothman*, No. 16,534 (C.A.D.C.), January 11, 1962, 49 LRRM 2394. See, also, *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 422 (C.A. 9), certiorari denied, 342 U.S. 815.

2. Although it is irrelevant in view of the lack of jurisdiction in the court of appeals to review the General Counsel's refusal to issue a complaint, we may also point out that petitioners clearly fail to make out any case of an abuse of discretion or of

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[4] See Senator Taft's statement at 93 Cong. Rec. 6859, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 1622-1623.

a patent misapplication of statutory terms by the General Counsel. Petitioners alleged (R. 8a-9a) that the Unions' strike against certain employer-members of petitioners' multi-employer bargaining associations constituted *per se* a refusal to bargain in good faith, in violation of Section 8(b)(3) of the Act.[5] There is no evidence, however, that the Unions' strike was anything but a peaceful strike designed to exert economic pressure on the multi-employer association in support of lawful demands made by the Unions during current collective bargaining negotiations. The General Counsel's determination, that the strike did not constitute a *per se* violation of Section 8(b)(3), is clearly in accord with settled principles. See, *e.g.*, *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477; cf. *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87.[6]

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[5] Petitioners' suggestion (Pet. 5) that Section 8(b)(4) of the Act—the "secondary boycott" section—is involved here is misleading. No secondary boycott is involved; nor was such conduct alleged by petitioners' unfair labor practice charge.

[6] The informal administrative files of the General Counsel indicate that the present case is for all practical purposes moot because the parties reached agreement on a new collective bargaining contract several days before the Regional Director dismissed petitioners' charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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General Counsel,

DOMINICK L. MANOLI,
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FEBRUARY 1962.

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